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IN THE

Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In a civil action alleging race discrimination in the "mak[ing] and enforc[ing]" of contracts under 42 U.S.C. § 1981, should a court continue to borrow the forum state's statute of limitations for personal injuries on all claims, see *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987), or instead apply that limitations rule only to "contract formation" claims and apply the "catch-all" four-year period of 28 U.S.C. § 1658 to other claims?

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RESPONDENT'S BRIEF ON THE MERITS

The issue here is the proper construction of 28 U.S.C. § 1658, which applies a four-year catch-all limitations period to civil actions "arising under" federal statutes enacted after December 1, 1990 that lack an explicit limitations period. Petitioners' claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts under 42 U.S.C. § 1981 "aris[e] under" statutory language in force since 1866 and now codified in § 1981(a) – and not under § 1981(b) which simply defines the "make and enforce" element of the cause of action enacted over a century ago.

Petitioners and the government, however, offer a different interpretation that is both superficial and flawed: (a) The phrase "arising under" has a plain, settled meaning under 28 U.S.C. § 1331 – that a case "arise[s] under" a federal law whenever that law "forms an ingredient of the original cause," *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) – and (b) this meaning must apply in § 1658.

In fact, under the most natural reading of § 1658 – and the one adopted by the Court of Appeals – petitioners' claims "arise under" the original statutory language of § 1981. At the very least, however, the phrase "arising under" is inherently ambiguous, and its meaning is driven by the context in which it appears and the purposes for which it is used. And, while the phrase "arising under" has a general meaning in the context of federal subject-matter jurisdiction, § 1658 does not address subject-matter jurisdiction, but the wholly different question of the appropriate limitations period. The meaning developed under § 1331, accordingly, cannot simply be transferred to § 1658 where it is employed for a distinct purpose.

In § 1658, Congress barred the application of the new four-year catch-all limitations period to statutory regimes in place on December 1, 1990, in order to preserve existing limitations

rules, while simultaneously providing clarity and certainty about limitations rules for statutory regimes enacted in the future. To effectuate this language and Congress's purposes, the Court should hold that a claim "aris[es] under" a statute enacted prior to December 1, 1990, when such a statute codifies the claim and has a settled limitations rule, and under a statute enacted after December 1, 1990, only when such a statute codifies an entirely new claim without an existing limitations rule.

Amendments to statutes enacted before December 1, 1990 do not alter the analysis. Interpreting § 1658 to abrogate established limitations rules for civil actions because of *any* post-December 1, 1990 amendment to the underlying claim would contravene Congress's intent to preserve existing rules, to enact clear limitations rules, and to reduce litigation. Petitioners' claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts thus "aris[e] under" the operative language of § 1981, which is more than a century old, and are governed by the settled limitations rule of *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 660 (1987) (plurality opinion).

The interpretation of § 1658 proposed by petitioners and the government not only undermines the statute's purposes, it also produces irrational, indeed absurd, results. "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitation." *Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985) (quotations omitted). Yet, petitioners and the government say that claims "arising under" the same statutory subsection – § 1981(a) – have two different limitations periods. This anomalous situation will occur whenever Congress amends an existing statute that contains a private cause of action. In addition, courts will have to decide whether any claim "arising under" an amended statute is, in fact, new. In this case, it is clear that Congress expanded § 1981's scope by amendment; but that clarity will not usually exist and chaos will ensue when courts try to

ascertain newness after an amendment to a statute that is the subject of a circuit split or that lacks a definitive interpretation.

Moreover, for each post-December 1, 1990 enactment that creates "new" claims, as in this case, the parties will litigate, and courts will have to decide, whether the factual allegations state a newly meritorious or previously meritorious claim. Finally, if petitioners' and the government's test is accepted, the phrase "arising under" nonetheless may have to be interpreted differently when States are § 1981 defendants, because Congress did not clearly state that § 1658 applies to States.

There is no reason to give an ambiguous statute such a counter-productive interpretation. This Court should instead interpret § 1658, as the Court of Appeals did, to maintain settled limitations rules for existing statutory regimes, and to produce clarity and reduce litigation – *viz.*, to provide that a claim "aris[es] under" a post-December 1, 1990 statute only if such a statute codifies a wholly new claim without an existing limitations rule.

STATEMENT OF THE CASE

1. From its original enactment in the Civil Rights Act of 1866 and the Civil Rights Act of 1870[1] until today, the language now codified at 42 U.S.C. § 1981(a) has remained the same. It provides that "[a]ll persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." To state a claim under this law, a plaintiff has always been required to allege that (a) a person (b) within the jurisdiction of the United States (c) has been denied (d) the right to make and enforce contracts (e) that a

[1] *See* Section 1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27; Section 16 of the Civil Rights Act of May 31, 1870, ch. 114, 16 Stat. 140, 144.

white citizen has. Section 1981 has never included an express statute of limitations; it has long been settled, however, that the courts should apply the forum state's limitations period for personal injury actions. See *Goodman*, 482 U.S. at 660-64; *Wilson*, 471 U.S. at 267.

Until 1989, the courts of appeals were divided on the question whether the phrase "make and enforce" contracts included discrimination following contract formation, including discriminatory termination. In 1989, however, this Court resolved that conflict when it held that the statutory ban on discrimination in the making and enforcement of contracts did not apply to conduct occurring after contract formation. *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989).

2. On December 1, 1990, Congress enacted a new catch-all statute of limitations for actions arising under federal statutes. See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, tit. III, § 313(a), 104 Stat. 5104, 5114-15. It provided that:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues. [28 U.S.C. § 1658(a).]

This law did not enact the recommendation of the Federal Courts Study Committee, which had strongly urged Congress to enact a uniform limitations period that would apply in actions arising under *all* federal laws for which Congress had failed to state a limitations period. See *Report of the Federal Courts Study Committee* 93 (1990). Congress recognized that the practice of borrowing analogous state statutes of limitations for federal causes of action that do not contain limitations periods was in some respects undesirable, because it created uncertainty, bred litigation, and resulted in variations in the law governing federal rights and duties. H.R. Rep. No. 101-734, at 24 (1990). But, Congress

nonetheless explicitly refused to enact a more expansive provision that would have applied the four-year catch-all period to any "previously enacted legislation lacking a limitations period." *Id.*

Instead, faced with strenuous opposition to the recommended law from groups that supported existing borrowed statutes of limitations for claims arising under existing federal statutes, Congress compromised and enacted a law that authorized application of a federal catch-all period only in civil actions arising under laws enacted *after* December 1, 1990. As the House Report explained:

> Witnesses testifying on behalf of the Department of Justice and the Judicial Conference, urged that this section be made retrospective, so as to provide a fallback statute of limitations for previously enacted legislation lacking a limitations period. As witness George Freeman noted at the hearing, however, with respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs. [*Id.*]

At the time Congress enacted the federal catch-all limitations period, the federal limitations period for § 1981 actions was established for numerous forum states. See 6 Lex

K. Larsen, *Employment Discrimination* § 104.06[1], at 104-21 to 104-22 nn.12, 16 (2d ed. 2003) (citing cases).

3. The next year, in 1991, Congress amended § 1981 in response to *Patterson*. The Civil Rights Act of 1991 maintained the existing statutory language as subsection (a), and then added a subsection (b), defining the phrase "make and enforce contracts" as follows:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. [Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(b), 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981(b)).]

Although the 1991 Act amended the civil rights laws, including § 1981, in numerous ways, see *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 305 n.5 (1994) ("[s]eldom if ever has Congress responded to so many decisions [of the Supreme Court] in a single piece of legislation as it did in the Civil Rights Act of 1991") (citing *Landgraf* v. *USI Film Products*, 511 U.S. 244, 250-51 (1994)), Congress did not alter the established limitations rule governing § 1981 actions. Indeed, the only legislative history related to the statute of limitations in the 1991 Act is a Committee Report reflecting an assumption that the rule established in *Goodman* would continue to apply. See H.R. Rep. No. 102-40, pt. 1, at 63 (1991) ("under 42 U.S.C. section 1981, . . . victims have a longer period of time to commence suits [than do Title VII plaintiffs]. In the absence of an express limitations period . . . , courts applying the statute have looked to analogous state statutes of limitations. These statutes typically allow two or three years, and allow up to six years in some states").

4.a. Petitioners are African-American former employees of Donnelley's Chicago manufacturing division and certain

other divisions. On January 26, 1993, Donnelley was informed by Sears, Roebuck and Company that Sears would no longer publish, and hence Donnelley would no longer print, the so-called "Big Book" catalogue. Two days later, Donnelley decided to close its Chicago manufacturing division. Donnelley terminated all of the division's temporary employees who worked exclusively on Sears' production; most full-time employees were also terminated or transferred under a job posting system by March 31, 1993. The shutdown was complete by July 31, 1994, when the remaining skeleton crew was terminated.

No complaint related to the 1993 shutdown decision was asserted until November 25, 1996, when petitioners filed a class action, claiming, *inter alia*, violations of "the Civil Rights Act of 1871, as amended, and as amended by the 1991 Civil Rights Act." J.A. 9-10. Specifically, petitioners alleged discriminatory termination and refusal to transfer related to the closing of the Chicago division, as well as discriminatory assignment to temporary jobs and the maintenance of a racially hostile work environment. *Id.* at 9-20. In this action, the district court certified three classes: Class 1, alleging discriminatory termination and denial of transfers in the Chicago division shutdown, Class 2, alleging discriminatory assignment to temporary jobs and denial of promotion to regular, full-time jobs, and Class 3, alleging racial harassment at the Chicago division and two others.

Donnelley sought partial summary judgment with respect to Class 1 and Class 2 and all members of Class 3 who were employed at the Chicago division, asserting that the § 1981 claims were governed by Illinois' two-year statute of limitations for personal injury actions and were therefore time-barred. Petitioners argued that their claims were governed instead by the four-year period in § 1658.

The district court denied the motion for partial summary judgment. With respect to Classes 1 and 3, the court held that Congress intended § 1658 to apply to § 1981 claims alleging

discrimination in the "mak[ing] and enforc[ing]" of contracts, albeit only to the extent that the phrase was expanded in the Civil Rights Act of 1991. Pet. App. 28a-40a. It held that "whenever Congress, after December [1,] 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action." *Id.* at 37a. Thus, it concluded that "[c]laims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b) . . . clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658." *Id.* at 37a-38a. The court concluded that the Class 1 and 3 petitioners' claims arise under § 1981(b) and therefore that they are governed by § 1658. *Id.* at 40a.

The district court refused to decide on summary judgment that § 1658 applies to the Class 2 assignment and promotion discrimination claims pending further development of the facts and the briefing of the question whether those claims would have been actionable even under *Patterson* and prior to the 1991 Act. See Pet. App. 40a ("[t]he claims asserted by Class 2, however, are not as easily drawn, and the parties are directed to sort out this question amongst themselves in light of the Court's ruling"). The district court certified its decision with respect to Classes 1 and 3 for interlocutory appeal to the Seventh Circuit. See 28 U.S.C. § 1292(b); Pet. App. 12a.

b. The court of appeals reversed. It concluded that petitioners had filed a civil action "arising under" § 1981(a). The court reasoned that § 1981(b) simply "makes clear that 'make and enforce' includes post-formation conduct" and that § 1981 actions, including those for discrimination in post-formation conduct, continue to arise under § 1981(a) in the sense Congress intended in § 1658. The court also pointed out that nothing in the 1991 Act indicates any congressional intent to alter the long-settled practice of borrowing state law limitations periods in § 1981 claims and, indeed, that the only

evidence of congressional intent is to the contrary. Pet. App. 25a.

Petitioners timely sought rehearing and rehearing *en banc*, but those petitions were denied. Pet. App. 1a-2a.

SUMMARY OF THE ARGUMENT

Petitioners' allegations of race discrimination in the "mak[ing] and enforc[ing]" of contracts state claims that originate in, or "aris[e] under," the language of § 1981, enacted and in force since 1866. These claims are governed by the forum state's statute of limitations for actions for personal injury under the limitations rule established in *Goodman*, 482 U.S. at 660-62.

In Part I, we show that § 1658 does not alter the limitations rule for claims under § 1981. That statute applies the four-year, catch-all period only to claims "arising under" statutes enacted after December 1, 1990. Petitioners' claims "aris[e] under" the operative language of a statute enacted more than a century ago, with a settled limitations rule established by this Court in 1987 – not under the amendment of the definition of the "make and enforce" element of a § 1981 claim. Moreover, in enacting § 1658, Congress intended to preserve settled limitations rules. It would therefore contravene the language and congressional intent underlying § 1658 to interpret that provision to abrogate established limitations rules for statutory regimes enacted prior to December 1, 1990 whenever such a statute is amended.

Petitioners and the government, however, contend that the phrase "arising under" has a single, settled meaning that must be applied to § 1658. They rely on the "federal ingredient" interpretation of "arising under" in 28 U.S.C. § 1331, that delineates the scope of the federal courts' subject-matter jurisdiction. Section 1658 does not address subject-matter jurisdiction and the phrase "arising under" is not used to ensure that federal courts have the power to decide questions

of federal law. Instead, the issue under § 1658 is the single appropriate limitations rule for a claim "arising under" a particular statutory regime. Moreover, the phrase "arising under" is inherently ambiguous, and this Court has routinely interpreted it in light of its statutory context and the purposes it was intended to serve. Here, the Court should follow its usual practice and interpret the phrase "arising under" to preserve established limitations rules for existing statutory regimes and to draw a bright line between claims governed by established limitations rules as of December 1, 1990, and entirely new claims codified in statutes enacted after December 1, 1990.

In Part II, we show that the interpretation of § 1658 proffered by petitioners and the government achieves neither of the statutory purposes and, indeed, undermines them. Most notably, application of the "federal ingredient" interpretation of the phrase "arising under" would displace limitations rules for claims that had merit even before December 1, 1990. This is because if a court wants to apply the "federal ingredient" standard as interpreted under § 1331, a claim would "aris[e] under" a post-December 1, 1990 statute whenever *any* element of the claim is based on a statutory provision amended after that date. This will be so even if that claim also would have been meritorious under the pre-amendment statute. This is precisely the result Congress intended to foreclose in § 1658; the "federal ingredient" interpretation of § 1658 is plainly wrong.

Nor can this interpretation be salvaged by saying, as petitioners and the government do, that a claim "aris[es] under" a post-December 1, 1990 statute when such a statute is an ingredient of the claim *and* when the claim previously would have lacked merit. This reading of "arising under" would mean that a new claim is created whenever a statute is amended to alter the scope of an existing cause of action – claims that rely on the alteration for their merit would be governed by § 1658, while claims that would have been

meritorious even absent the alteration would be governed by the established limitations rule. An amendment reducing the number of employees required to subject an employer to liability under a federal law from 25 to 15 for example, would mean that claims against employers with 25 employees would be governed by the established limitations rule and claims against employers with between 15 and 24 employees would be governed by § 1658.

This situation not only contravenes Congress's intent by eliminating the established limitations rule for claims "aris[ing] under" many venerable federal statutory regimes, it also leads to irrational, absurd, and counter-productive results. After a statute is amended in any way, claims "arising under" the same statutory subsection will be subject to two distinct limitations rules. So here, claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts will be subject to the *Goodman* rule and § 1658, depending upon the court's characterization of the underlying acts. The unfairness and confusion this unprecedented situation will generate cannot be overstated.

In addition, any time a statute is amended, the courts will have to decide whether the amendment creates "new" claims. That determination was relatively easy here, where Congress had expressly overruled a decision of this Court. But such clarity will rarely exist. A statute may be an attempt to clarify a law that has never been uniformly interpreted and to invigorate a law that has not been interpreted at all. An amendment may approve the interpretation adopted by one circuit and abrogate that adopted by another; in that circumstance, under petitioners' view, the correct interpretation of § 1658 would *require* the application of different limitations rules for precisely the same claim in different circuits. Moreover, even after a limitations period is assigned to "new" claims under an amended statute, additional litigation will be required, as was the case here. There will be disputes about whether the factual allegations

state an "old" or "new" claim because the limitations period will turn on that decision.

An ambiguous statute like § 1658 should not be interpreted to produce results that contravene congressional intent and the very purposes of limitations rules. It is particularly inappropriate to add this confusion and complexity to § 1981 litigation. Nothing in the Civil Rights Act of 1991 suggests any intent to overrule the Supreme Court's decision in *Goodman*, which is notable in light of the Act's express overruling of other of this Court's decisions. Moreover, it is critically important to have "'firmly defined, easily applied'" rules regarding limitations in the civil rights context. *Wilson* U.S. at 266.

For all these reasons, the interpretation of § 1658 urged on the Court by petitioners and the government should be rejected. The Court instead should hold that claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts "aris[e] under" the original language of § 1981, effective since 1866, and are governed by the *Goodman* rule. The expanded definition of the "make and enforce" element of such a claim does not alter the conclusion that petitioners' claims "aris[e] under" the original operative language within the meaning of § 1658.

ARGUMENT

I. THE PHRASE "ARISING UNDER" IN § 1658 IS AMBIGUOUS AND SHOULD BE INTERPRETED BASED ON ITS CONTEXT AND PURPOSES, NOT BY APPLYING CASE LAW DEVELOPED IN AN ENTIRELY DIFFERENT STATUTORY SETTING.

In *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987), this Court established the limitations rule for actions brought under the operative language of § 1981. Such actions are governed by the forum state's limitations period for personal injuries. Because petitioners' claims state a cause of

action under – *i.e.*, "aris[e] under" – § 1981, and because the time period for such claims in the forum state of Illinois is two years, petitioners' claims are time-barred.

Section 1658 does not alter the limitations rule for actions under § 1981. Section 1658 states in pertinent part that a "civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658. In common parlance, "'arising under'" means to "'spring up'" or to "'originate,'" as the government notes. Govt. Br. 10-11 (quoting *American Heritage Dictionary* 99 (3d ed. 1992), and *Oxford English Dictionary* 445 (1933)); see also *Black's Law Dictionary* 102 (7th ed. 1999) (defining "aris[ing]" as "stem[ming] (from)"). Because a civil action springs up or originates from the statute codifying the elements of the claim, petitioners' claims spring up from, or originate in, § 1981(a), not § 1981(b) which simply defines the "make and enforce" element of the cause of action created by § 1981. One would *not* ordinarily say that a claim "aris[es] under" or originates in a subsection of a statute that provides only a definition of an element of a legal claim.[2] On this reading, petitioners' claims plainly are not governed by § 1658's limitations period.

Moreover, in § 1658, Congress clearly intended to preserve the limitations rules governing existing statutory regimes, and to provide clear and definitive limitations rules for newly-created statutory regimes. See *supra* at 4-5. Existing limitations rules are *not* preserved if those rules cease to apply whenever an existing statutory regime is amended in any way, however minor; and confusion, not clarity, is the result if

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[2] For example, one would ordinarily identify a federal securities fraud claim as "arising under" the substantive provisions in 15 U.S.C. § 78j, and not under the definition of "security," *see id.* § 78c(a)(11). Similarly, one would say that an age discrimination suit arises under the prohibition against age discrimination, *see* 29 U.S.C. § 623, and not the definition of "employer," *see id.* § 630(b).

some claims arising under a statutory subsection have one limitations period, while other claims arising under the same subsection are governed by a different period.

To fulfill Congress's intent, accordingly, the Court should hold that a claim "aris[es] under" a statute enacted prior to December 1, 1990, when such a statute codifies the claim and has a settled limitations rule, and that a claim "aris[es] under" a statute enacted after December 1, 1990 only when such a statute enacts an entirely new claim that is not subject to an existing limitations rule. This test both preserves limitations rules for statutory regimes in place on December 1, 1990, and provides a clear, easily administrable rule. As demonstrated *infra* at 22-31, the alternative interpretations of § 1658 offered by petitioners and the government have consequences that directly conflict with congressional intent and are irrational – increasing uncertainty, litigation, and unfairness.

Petitioners and the government, however, argue that as a legal term of art, the phrase "arising under" has a single plain meaning that should be applied here. They point to the generally applicable interpretation of the phrase "arising under" that has evolved under 28 U.S.C. § 1331, to determine when a federal court has subject-matter jurisdiction over a claim. In that setting, a case "arise[s] under" a federal law "whenever federal law 'forms an ingredient of the original cause,'" Govt. Br. 11 (quoting *Osborn*, 22 U.S. (9 Wheat.) at 823), or is a "'necessary element of a [a claim],'" *id.* at 12 (alteration in original) (quoting *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988)). In the § 1331 sense, a provision of the Civil Rights Act of 1991 is an ingredient or element of petitioners' claim, and thus petitioners and their *amici* assert that § 1658 unambiguously applies.[3]

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[3] Petitioners and their *amici* support an asserted plain language reading of "arising under," but not of § 1658 as a whole. The "plain language" of § 1658 simply says that an action arising under a post-December 1, 1990 act "may not be commenced *later* than 4 years after the cause of action accrues." 28 U.S.C. § 1658 (emphasis supplied). It does not by its terms preclude the continuing application of shorter limitations periods, such as those applied under the *Goodman* rule.

This settled-meaning argument is wrong for two reasons:

First, in § 1658, the phrase "arising under" does not address federal subject-matter jurisdiction, but instead a wholly different question (the appropriate limitations period); the contexts and purposes of these provisions differ so dramatically that the interpretation developed in one cannot blithely be transferred to the other simply because both reside in Title 28 of the United States Code. The Court instead should follow its usual practice of interpreting an inherently ambiguous phrase in light of the statute's context and purposes.

In § 1658, the phrase "arising under" is used in a setting and for purposes wholly distinct from those underlying § 1331. Section 1331 uses the phrase "arising under" to delineate the broad scope of the federal courts' subject-matter jurisdiction. Section 1331 inclusively defines the broad area in which federal courts have power in order to preserve the supremacy and consistency of federal law. Under § 1331, a single claim or cause of action may "aris[e] under" more than one federal law; and federal and state courts generally have overlapping jurisdiction over any claim that "aris[es] under" both federal and state law.

In sharp contrast, § 1658 is not a statute delineating a federal court's subject-matter jurisdiction. It is instead intended to create a test that determines the single limitations rule applicable to a particular legal claim. And, although a legal claim may "aris[e] under" numerous federal laws for the purpose of determining whether federal courts have subject-matter jurisdiction under § 1331, a claim "aris[es] under" only one statute for the purpose of determining its statute of limitations.

Case law interpreting § 1331 should not be imported blindly into the distinct context of § 1658, where Congress was engaged in the substantively different enterprise of assigning a single limitations rule to a claim.[4] Indeed, as we show *infra* at 22-23, in light of § 1658's different context and purposes, even petitioners and the government urge the Court to adopt not the "federal ingredient test," but a more stringent test – again demonstrating the ambiguity of the phrase "arising under."[5]

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[4] For similar reasons, petitioners' and the government's reliance on *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298 (1994), is wholly misplaced. In *Rivers*, the Court addressed the question whether the expansion in the meaning of "make and enforce contracts" should be applied retroactively. The test for retroactive application of a statutory provision is whether the provision imposes new legal liabilities on past conduct, and the Court concluded that the expanded scope of § 1981 created new liabilities and thus should not be applied retroactively. *Id.* at 304. But, Congress did not incorporate the test for retroactivity into § 1658; indeed, § 1658 makes no reference to the date that a claim accrues – the crucial date for purposes of assessing retroactivity. Instead, in § 1658, Congress focused on the date that a statute is enacted, and limited the application of the federal catch-all period to claims "arising under" statutory regimes enacted after December 1, 1990 statutes. Congress sought to protect *not* the settled expectations of persons who had engaged in past acts, but instead the "settled expectations" of persons litigating under statutes whose "relevant limitations period has long since been resolved by judicial decision." H.R. Rep. No. 101-734, at 24. The fact that the expanded definition of "make and enforce contracts" is not retroactive thus does not decide the question whether a claim based on that expanded definition "aris[es] under" a statute enacted before or after December 1, 1990, within the meaning of § 1658.

[5] Further evidence of the ambiguity of the phrase "arising under" in § 1658 is the multiplicity of interpretations adopted by the courts of appeals and the federal district courts. The majority of the courts of appeals to address the question have rejected the interpretation of petitioners and their *amici*, recognizing the ambiguity of the phrase and refusing to adopt a reading that would generate confusion and substantial litigation not only under § 1981, but under numerous statutes whose limitations rules were thought to be settled. *See* Pet. App. 26a–27a; *Zubi*

Second, and equally to the point, while "arising under" may have a generally applicable meaning in determining federal subject-matter jurisdiction, it does not have a single meaning even in that context and certainly has no plain, settled, or generally applicable meaning in other, unrelated settings. This Court routinely examines statutory context and purposes to interpret the ambiguous phrase "arising under."

For example, the Medicare and Social Security Acts instruct that "[n]o action against the United States, . . . shall be brought under section 1331 or 1346 of title 28 to recover on any claim *arising under* this subchapter." 42 U.S.C. § 405(h) (emphasis supplied). In this context, the Court has held that claims "aris[e] under" the Acts, and must be administratively exhausted, when they are "inextricably intertwined" with a benefits claim. See *Heckler* v. *Ringer*, 466 U.S. 602, 614 (1984); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).[6] The Court does not apply the "federal ingredient" test in this context, because it would not serve the purpose of distinguishing claims that must be administratively exhausted from claims that need not be exhausted.

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v. *AT&T Corp.*, 219 F.3d 220, 222 (3d Cir. 2000); *Madison* v. *IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated*, 536 U.S. 919 (2002); *but see Harris* v. *Allstate Ins. Co.*, 300 F.3d 1183, 1188 (10th Cir. 2002). The majority of district courts – the courts that best comprehend and will bear the burdens of the litigation created by petitioners' and the government's interpretation – have also concluded that § 1658 is ambiguous and rejected petitioners' view as both contrary to the statutory purposes and unworkable. See B. Byers, *Adventures in Topsy-Turvy Land: Are Civil Rights Claims Arising Under 42 U.S.C. § 1981 Governed by the Federal Four-Year "Catch-All" Statute of Limitations, 28 U.S.C. § 1658?*, 38 Washburn L.J. 509, 528-34 (1999) (citing numerous cases); *Harris*, 300 F.3d at 1188 (citing numerous cases).

[6] Thus, although a claim "arising under" the Medicare or Social Security Act may also "aris[e] under" the Constitution or state law as that phrase is generally used in § 1331, *see Salfi*, 422 U.S. at 760-61, the consequence of a determination that a claim "aris[es] under" the Medicare or Social Security Acts is that federal and state courts are *deprived of* jurisdiction except as authorized by those Acts.

Even under § 1331, the "federal ingredient" interpretation does not always hold sway. In *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, this Court held that "the presence of a federal issue in a state cause of action" does not make the action one "arising under" federal law for § 1331 purposes, when Congress intended "no federal private cause of action" for a violation of the federal law at issue. 478 U.S. 804, 811-12 (1986).[7] Similarly, under the "complete preemption" doctrine, the Court has developed different tests to determine when a claim "aris[es] under" federal law, because that determination entirely displaces *all* state law claims.[8]

The critical point is that the meaning of the phrase "arising under" and the consequences of a determination that a particular claim "aris[es] under" a particular federal law vary with their context. Far from having a plain meaning with established consequences, the phrase is ambiguous and its interpretation depends upon its context and the purpose for which it is employed. In § 1658, the phrase "arising under" is employed to determine the unique limitations rule governing a particular claim, to preserve limitations rules in place on December 1, 1990, and to provide a clear rule for the future; it should be interpreted to achieve those purposes.

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[7] The government attempts to distinguish *Merrell Dow* by saying that there is a federal private right of action to enforce § 1981, Govt. Br. 12 n.3, but misses the crucial relevance of the decision and the complete preemption cases: A determination that a claim contains a "federal ingredient" does not uniformly result in a determination that the claim "aris[es] under" that federal law even under § 1331.

[8] For example, a claim "aris[es] under" § 301 of the LMRA only if the claim is "substantially dependent on analysis of a collective-bargaining agreement," *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 394 (1987) (quotations omitted), not whenever § 301 is an ingredient of a claim. A claim "aris[es] under" § 502(a) of ERISA only if it is a claim to enforce benefit rights derived from a covered plan, *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58, 65 (1987), not whenever a plan benefit is an ingredient of a claim.

II. THE INTERPRETATIONS OF § 1658 OFFERED BY PETITIONERS AND THE GOVERNMENT ARE CLEARLY WRONG; RESPONDENT OFFERS THE ONLY REASONABLE INTERPRETATION THAT COMPORTS WITH THE STATUTE'S LANGUAGE AND PURPOSES.

A. The Phrase "Arising Under" In § 1658 Clearly Cannot Be Interpreted As In § 1331.

As set forth above, the phrase "arising under" in § 1658 is best read as the Court of Appeals read it – to provide that petitioners' claims "aris[e] under" the original "make and enforce" language of § 1981, not under the elaboration of that language in § 1981(b) – and is, at the very least, ambiguous. What is as fundamentally important, moreover, is that the application of the interpretation of "arising under" developed under § 1331 would contravene the language and purposes of § 1658.

Application of the "federal ingredient" interpretation of the phrase "arising under" in § 1658 would displace limitations rules for legal claims that, on both parties' view, pre-date December 1, 1990 – an outcome Congress clearly rejected. On the "federal ingredient" view of "arising under," a civil action "aris[es] under" a statute enacted after December 1, 1990, whenever *any* element of the claim is based on an Act amended after December 1, 1990, whether or not that claim would have been meritorious prior to the amendment. That is because the amended statute constitutes, at least in part, the legal basis of the claim.

An example clearly illustrates this point. Assume that a federal statute defines an employer as a person employing 25 or more employees; and assume further that after December 1, 1990, Congress amends the Act to define an employer as a person employing 15 or more employees. An employee employed by an employer with 25 employees files a civil action against the employer after December 1, 1990. That

action plainly "aris[es] under" the amended Act in the "federal ingredient" sense, because an element or ingredient of the claim is employment by a person with 15 or more employees (*i.e.*, the amended provision). Clearly, it is the amended Act that provides the legal basis for this element of the claim; no plaintiff would allege that this element of his or her claim is based on the pre-amendment law, in part because that provision no longer exists. See also *Zubi* v. *AT&T Corp.*, 219 F.3d 220, 226 n.7 (3d Cir. 2000) (under the "federal ingredient" interpretation, "the four-year limitations period [would] apply[] to any civil lawsuit containing a claim based on a statute that has been amended in any way after December 1, 199[0]").

Accordingly, under the "federal ingredient" interpretation of "arising under," all claims that contain any element based on a statute amended after December 1, 1990 would "aris[e] under" the amended Act whether or not those claims were meritorious before the amendment. This was an alternative clearly available to Congress and, indeed, urged on Congress, but ultimately rejected. See *supra* at 4-5. Thus, the result advocated by petitioners and the government would directly contravene Congress's decision to preserve existing limitations rules – a decision reflected in both the language of the statute and the legislative history:

> [W]ith respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision . . . . [and] retroactively imposing a four year statute of limitations . . . would threaten to disrupt the settled expectations of a great many parties. *Given that settling expectations . . . is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively . . . .*" [H.R. Rep. No. 101-734, at 24 (emphasis supplied).]

Based on a similar analysis, the Government is wrong when it asserts that under the "federal ingredient" interpretation of

"arising under," a civil action would not "aris[e] under" an amended statute if Congress simply changed the burden of proof. See Govt. Br. 19-20. If federal law provides the level of proof that is required as a matter of law to prove an element of a claim, then the civil action depends upon that federal law, and federal law is a necessary ingredient in adjudication of the claim. Put differently, in the "federal ingredient" sense, a claim "aris[es] under" any federal law when "the right to relief depends upon the construction or application of the Constitution or laws of the United States." *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921). Accordingly, a serious and critical defect in petitioners' and the government's assertion that "arising under" has the same meaning in § 1658 as it does in § 1331 is that § 1658 would apply almost every time Congress amends a statute containing a private cause of action – a result directly contrary to what all parties acknowledge was Congress's intent.

This reality, by itself, illustrates not only that the phrase "arising under" in § 1658 is ambiguous, but also that it cannot be interpreted as in § 1331, and that its meaning should be determined by its statutory context and purposes.[9] See also *Zubi*, 219 F.3d at 223 n.5 ("[s]ection 1658 seeks to distinguish between cases arising under certain Acts of

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[9] There is an additional reason that petitioners' and their *amici*'s "federal ingredient" interpretation of "arising under" does not apply under § 1658. On this interpretation, the four-year catch-all period would govern state law claims without express limitations periods when an element or ingredient of such a claim is based on a federal statute enacted after December 1, 1990. As the government points out, on the interpretation of "arising under" developed under § 1331, "'a case may arise under federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law."'" Govt. Br. 12 (quoting *Merrell Dow*, 478 U.S. at 808). A rote application of the "federal ingredient" interpretation of "arising under" would, accordingly, subject state-law claims not governed by express limitations periods to the federal catch-all limitations period – a result plainly not intended by Congress.

Congress from cases arising under other Acts of Congress *for the purpose of preserving existing statute of limitations case law*") (emphasis supplied).

B. Petitioners' And The Government's Attempt To Interpret § 1658 To Preserve The Limitations Rules For Some, But Not All Claims Under Statutes Enacted Prior To December 1, 1990 Undermines The Statute's Purposes And Has Irrational, Indeed Absurd, Results.

The petitioners' and government's briefs implicitly acknowledge that the "federal ingredient" interpretation is wrong, because they ultimately propose a different interpretation. They suggest that a claim "aris[es] under" a statute enacted after December 1, 1990, only if that statute is an ingredient of the claim *and* the claim is "new" in the sense that it became meritorious as a result of the statute – *i.e.*, the "federal ingredient" plus "new" claim interpretation. See Govt. Br. 20 (explaining that the post-December 1, 1990 statute must "create liabilities that had no legal existence before the Act was passed") (internal quotation and alteration omitted). As noted, this contention disproves the assertion that the phrase "arising under" has is a legal term of art with a single, established meaning. Equally to the point, this interpretation, too, is wrong.

Like the "federal ingredient" test itself, the "federal ingredient" plus "newness" test fails on its merits. Preliminarily, it is worth noting that the "newness" part of this test is wholly untethered from the meaning of "arising under" in § 1331. A claim "aris[es] under" a federal law under § 1331 when it is based on that law, without regard to whether the claim is ultimately deemed to have legal merit. See *Steel Co.* v. *Citizens For A Better Env't*, 523 U.S. 83, 89 (1998) (a case "aris[es] under" federal law "'if the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another'").

A claim asserting race discrimination in the "mak[ing] and enforc[ing]" of a contract has always "aris[en] under" § 1981 within the meaning of § 1331, despite the varied "construction[s]" given the phrase "make and enforce" by the courts and Congress.

Moreover, although neither petitioners nor the government make any effort to define the "federal ingredient" plus "newness" test, they seem to suggest that a claim is "new" whenever it "aris[es] under" a statutory regime that did not protect the right being asserted prior to December 1, 1990. This interpretation requires a court to conclude that a "new" claim is created whenever a statute is amended in any way that expands or contracts the scope of an existing cause of action. For example, if the definition of employer is amended to reduce the required number of employees from 25 to 15, claims against employers with 25 employees will be governed by the old limitations rule, while claims against employers with between 15 and 24 employees will be governed by § 1658.

This approach to newness is contrary to § 1658's purposes. Congress made clear in § 1658 its intent to preserve the existing limitations rules governing statutory regimes. This specific intent is directly contravened if § 1658 is interpreted to command that an existing limitations rule is discarded for each and every claim under an existing statutory regime that depends upon any amendment to the claim, however minor.

For this reason alone, the question whether a civil action arises under a post-December 1, 1990 statute should not turn on whether the claim has legal merit as a result of the statute. But, this reason does not stand alone. If the "federal ingredient" plus "newness" test is adopted, § 1658 will produce results that are irrational and, indeed, absurd, in light of the purposes of limitations law generally and § 1658 particularly. It is a well-established principle of statutory interpretation that, unless compelled by a statute's unambiguous language, interpretations that produce such

absurd, irrational, or counter-productive results are strongly disfavored. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70-71 (1994); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (citing *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)). Since § 1658 can readily be interpreted to avoid these consequences, there is no reason to interpret the statute to produce such results.

The government seeks to disparage these arguments by characterizing them as "policy concerns." Govt. Br. 27. Petitioners' interpretation of § 1658 *is* bad policy because it would increase litigation and create uncertainty, but the argument that a statutory interpretation is wrong because it would have consequences utterly antithetical to Congress's known intent and, indeed, irrational in light of the statutory purpose and the realities of litigation may not be waved aside as a "policy concern[]." Given the ambiguity in the statute, these are precisely the kinds of concerns that should inform the Court's judgment as to how to interpret § 1658.

1. First, on petitioners' and the government's theory, claims "arising under" the same statutory subsection – § 1981(a) – would be subject to two distinct statutes of limitations. Claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts that are meritorious under *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 177-78 (1989), would be governed by the limitations rule established in *Goodman*, while claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts that are meritorious as a result of the Civil Rights Act of 1991 would be subject to § 1658. Using the example *supra* at 19-20, when Congress amends the definition of "employer" to decrease the required number of employees to 15, an employer with 25 employees will be subject to the "old" limitations rule, while an employer with 15 employees will be subject to § 1658's four-year period.

This result is not only irrational and unfair, it will also generate substantial confusion for unsuspecting plaintiffs and

unpleasant surprises for defendants that miscalculate their potential liability. See *Wilson*, 471 U.S. at 275 n.34 ("[p]laintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose").

Neither petitioners nor the government do business with this substantial problem and absurdity. Indeed, the government's entire response is that courts routinely apply different limitations periods to different claims in a single lawsuit, and that Title VII, for example, has a different limitations period than does § 1981. Govt. Br. 27. This is, at best, obfuscation. All lawyers are aware that claims "arising under" different statutes have individually determined limitations periods; most lawyers should be aware that claims "arising under" different provisions of a single statute might have different limitations periods, and that they should surely check. But, no lawyer will presume that claims arising under the same subsection of a single statute – indeed, claims that identically allege discrimination in the making and enforcing of a contract – will be governed by different limitations rules.

The government's attempt to slide by this obviously absurd and confusing consequence of the statutory interpretation it urges is understandable. Neither the government nor the petitioners were able to present any example in which Congress ever before created two limitations rules for the same language in the same subsection of the same statute. And, Congress did not mean to do so here. At a minimum, the Court should insist on much clearer language than appears in § 1658 before accepting such an outcome. In fact, Congress did not intend in § 1658 to split statutory subsections into fragments governed by different limitations rules simply because the claim embodied in that subsection is amended in some way after December 1, 1990. See, *e.g.*, *Zubi*, 219 F.3d at 224 (stating that "[a]doption of [this]

interpretation would seem to us to generate exactly the kind of confusion and unfairness that Congress sought to avoid"); *Davis* v. *California Dep't of Corr.*, No. Civ. S-93-1307, 1996 U.S. Dist. LEXIS 21305 (E.D. Cal. Feb. 23, 1996) (characterizing this approach as "confusing" and "unfair"); B. Byers, *supra* at 528-34 (describing judicial rejections of this outcome).

2. Second, on petitioners' interpretation ("arising under" plus legal merit resulting from a post-December 1, 1990 statute), courts will have to decide whether a claim "arising under" an amended statute is, in fact, a "new" claim – a claim whose legal merit is based on a post-December 1, 1990 Act of Congress. In this case, the nature of the "new" claim is clear. It is recognized that liability under § 1981 was expanded, because this Court had spoken on the scope of § 1981 and Congress reversed the Court's interpretation in the Civil Rights Act of 1991.

In many cases, however, that clarity will be lacking. Where there has been a circuit split and Congress simply clarifies a statute that has either been the subject of conflicting judicial interpretations, or where a statute has not been definitively interpreted, it will be virtually impossible for courts to decide whether Congress created a new claim and hence, whether the federal catch-all applies. As a result, different circuits would properly reach different conclusions about the appropriate statute of limitations, based on their differing past interpretations of the law in question (or their lack of any such interpretation, or their view of the majority rule) prior to the amendment. Those circuits whose pre-amendment interpretations of the law were consistent with the amendment would conclude that the amendment did not create a new claim, and thus did not trigger § 1658. By contrast, those circuits whose pre-amendment interpretations were abrogated by the amendment would conclude that the amendment *did* create new law, and thus did trigger § 1658. Thus, any time Congress amends a statute to clarify a law and eliminate a

circuit split, different circuits will end up with different limitations rules. Had the Court not granted certiorari in *Patterson*, for example, this would have been the outcome here.

As the court of appeals stated in *Zubi*, 219 F.3d at 224, "the line between an amendment that modifies an existing right and one that creates a new right is often difficult to draw." This is because

> [a]mendments frequently are intended to clarify the law when there has been a difference of opinion regarding the interpretation of an existing statute. In such situations, conflicting views on whether the clarifying amendment created new rights or merely codified the preexisting caselaw are what occasion the amendment. [*Id.*]

In *Zubi*, the court of appeals used other provisions of the Civil Rights Act of 1991 to demonstrate the uncertainty and litigation that would inevitably follow petitioners' proposed interpretation of § 1658. For example, Congress:

> adopted an amendment to the Civil Rights Act of 1964 "clarifying" that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Adoption of [petitioners'] interpretation of § 1658 would surely lead to litigation over whether a plaintiff alleging that race was a motivating factor in his discharge asserts a newly-created claim or an old one . . . . [*Id.* (citation omitted).]

The court made analogous points with respect to amendments easing a civil rights plaintiffs' burden of proof, modifying a civil rights defendant's affirmative defenses, and adding rights to compensatory and punitive damages. *Id.* at 224-25.

If § 1658 is interpreted in the manner advocated by petitioners and the government, then *every time Congress amends a law containing a private cause of action, there will be litigation about whether the amendment creates a new claim because it will determine the limitations period for a subset of civil actions arising under the statute as amended.* This is more than ample reason not to interpret § 1658 in this way. See *Wilson*, 471 U.S. at 272, 275.

3. Third, even after the litigation over an amended statute is resolved and a limitations period is assigned to claims based on the pre-amendment statute and claims based on the post-amendment statute, there will be additional litigation. There will be disputes about whether the allegations in the complaint are based on the pre- or post-amendment statute. We can consider this problem with specific reference to § 1981. On petitioners' interpretation, litigants and courts must determine whether § 1981 claims are addressed to pre-contract-formation discrimination (a meritorious legal claim prior to December 1, 1990) or post-contract-formation discrimination (a meritorious legal claim only after December 1, 1990) in order to decide the limitations period.

Similarly intractable questions about whether a claim "aris[es] under" a pre-amendment or a post-amendment statute will result from statutory amendments addressing not just the elements of the claim, but also the burden of proof, the showing needed to overcome an affirmative defense, or the available remedies. In each case, the courts will have to decide whether the allegations of the complaint state a claim solely because of the amended provisions of the statute or whether those allegations would have stated a claim for relief under the pre-amendment version of the statute. The government hedges its bet on this point by saying that "the plaintiff's right to maintain the action would not *necessarily* depend on the new burden or procedure specified by Congress," Govt. Br. 20, but this is essentially an

acknowledgement that the plaintiff's right would depend upon the amended provisions in some circumstances and therefore that the courts would always have to decide.

The government's belittling of this problem in this specific context, see *id.* 27 ("in the typical case, there is not likely to be confusion as to whether a Section 1981 claim arises under the 1991 Act"), is difficult to understand, as it is exemplified in both this case and in another of the court of appeals' decisions addressing the issue presented. Here, after accepting petitioners' interpretation of § 1658, the district court expressly refused to decide on summary judgment whether § 1658 applies to the Class 2 assignment and promotion discrimination claims presented in this case. Instead, the court stated that it would reserve the question of what limitations period applies to those claims pending further development of the facts and the briefing of the question whether those claims would have been actionable even under *Patterson* and prior to the 1991 Act. See Pet. App. 40a.

Similarly, in *Harris* v. *Allstate Insurance Co.*, 300 F.3d 1183, 1192-93 (10th Cir. 2002), the district court held that the defendants' alleged discrimination with respect to referrals to the plaintiffs' business stated a claim under § 1981, even prior to its amendment by the Civil Rights Act of 1991. The court of appeals reversed. It held that some of the plaintiffs' claims arose under pre-amendment § 1981, while others arose under post-amendment § 1981. *Id.* at 1193 & n.1. As these examples reveal, *Patterson* drew a line that is "bright" (Govt. Br. 27-28) at the extremes; but in the broad middle of the spectrum there is ample room and incentive for litigation about the nature of a claim, particularly under petitioners' interpretation of § 1658, because the characterization of the action will determine the limitations period.

Equally to the point, petitioners and the government offer no response to the fact that their proposed interpretation of § 1658 would apply not only to § 1981, but also to all other

statutory regimes without express limitations rules amended after December 1, 1990. In each case in which the limitations period is at issue, litigants will have a strong incentive to characterize the allegations as arising under the pre- or post-amendment statute, and the result will be additional litigation. See *Wilson*, 471 U.S. at 272 ("[t]he experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983").

4. Petitioners' and their *amici*'s interpretation offers one last opportunity for confusion. If claims based on the expanded definition of "make and enforce" in the 1991 Act "aris[e] under" that Act for purposes of § 1658, courts may need to make an exception to this interpretation of "arising under" for state defendants: States may not be subject to § 1658, because Congress failed to make an "unmistakably clear" statement in that statute of its intent to reach them. *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002); *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786 (1991).

In *Raygor*, the State had waived its immunity from suit in state court subject to a particular statute of limitations. This Court held that the federal statute that tolled that statute of limitations during the pendency of a related federal action was of doubtful constitutionality, because it altered the terms of the State's consent to suit in its own courts. As a consequence, the Court interpreted the federal statute not to reach, *i.e.*, not to toll the limitations period in, actions against states where the state had not consented to such tolling.

Analogously, under Section 5 of the 14th Amendment, Congress has waived states' immunity to suit under § 1981. Section 1658, however, was not enacted pursuant to Section 5. Congress has not clearly stated any intent to broaden the scope of § 1981's infringement on state sovereignty by

applying § 1658 to § 1981 claims against states – states that since 1985 have generally been subject to shorter limitations periods under this Court's longstanding interpretation of § 1988. See *Wilson*, 471 U.S. at 267-69. Applying the interpretive principle of constitutional doubt, courts should hold that a § 1981 claim based on the expanded "make and enforce" definition does *not* "aris[e] under" a statute enacted after December 1, 1990 pursuant to § 1658, when the defendant is a state.

If it were crystal clear that a claim based on the expanded "make and enforce" definition in the 1991 Act "aris[es] under" the 1991 Act, a confusing outcome would have to be endured – that is, a § 1981 claim would be governed by the *Goodman* limitations rule whenever it is meritorious under *Patterson*, and whenever a state is the defendant, but governed by § 1658 whenever the claim is meritorious under the expanded definition, unless the defendant is a state. But, as demonstrated above, the phrase "arising under" in § 1658 is ambiguous. There is no need, accordingly, to give the phrase "arising under" different definitions based on the nature of the defendant.

5. Finally, adding all of the above-described layers of complexity to § 1981 litigation is particularly unjustified. As noted *supra* at 6, neither the 1991 Act nor its legislative history alters the limitations rule for § 1981 actions established in *Goodman* or suggests that this Supreme Court decision had been overruled. The only statement related to limitations in the legislative history of the 1991 Act suggests a congressional assumption that *Goodman* would continue to govern. See H.R. Rep. No. 102-40, pt. 1, at 63 (describing the *Goodman* rule and contrasting it to the Title VII limitations rule).[10] Considering the substantial overhaul that

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[10] The government disparages the value of this legislative history, stating that it is not addressed to the provision of the 1991 Act overruling *Patterson*. Govt. Br. 25-26. But, for those to whom legislative history is

the civil rights laws received in 1991,[11] it is telling that the 1991 Act leaves existing limitations law in place.

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material, the Committee Report's assumptions about the settled state of limitations law under § 1981 are significant. Congress was aware that § 1981 and Title VII were complementary remedies for employment discrimination and was actively comparing the statutory regimes in amending the civil rights laws in 1991.

The government further argues that a Committee Report cannot override plain statutory language, *id.* at 26, but this criticism is far afield. There is no plain language in the 1991 Act altering or otherwise addressing the proper limitations period for § 1981 claims (or in § 1658 for that matter). The Committee Report is, accordingly, relevant to Congress's apparent intent not to alter the established limitations periods in the civil rights law it was otherwise extensively revising.

[11] In addition to amending § 1981, the 1991 Act made numerous other changes in the civil rights laws. Title VII of the Civil Rights Act of 1964 was amended to provide punitive and compensatory damages for intentional discrimination, Pub. L. No. 102-166, § 102, 105 Stat. at 1072; the Americans With Disabilities Act of 1990 ("ADA") was amended to provide punitive and compensatory damages for intentional discrimination on the basis of an individual's disability or handicapped status. *id.* § 102(a)(3), 105 Stat. at 1072; both Title VII and the ADA were amended to provide for jury trial where the complaining party seeks compensatory or punitive damages, *id.* § 102(c), 105 Stat. at 1073; Title VII was amended to require the employer to demonstrate that a practice challenged as having a disparate impact is job-related and consistent with "business necessity," *id.* § 105, 105 Stat. at 1074-75; Title VII was amended to provide that any reliance on a discriminatory factor is unlawful, *id.* § 107(a), 105 Stat. at 1075; both Title VII and the ADA were amended to clarify that American citizens working in foreign countries are covered by these laws, provided the employer is American-owned or controlled and that compliance does not violate foreign law, *id.* § 109, 105 Stat. at 1077-78; Title VII was amended to clarify that seniority systems are subject to challenge not only when adopted, but also when they first apply to or injury an individual, *id.* § 112, 105 Stat. at 1079; Title VII and the Attorneys' Fees Awards Act were amended to clarify that expert witness fees may be recovered as a form of attorneys' fees, *id.* § 113, 105 Stat. at 1079; the Age Discrimination in Employment Act was amended to adopt the "right to sue" procedures available under Title VII, *id.* § 115, 105 Stat. at 1079; many provisions of the Federal Civil Rights Laws were extended to employees of the House and Senate, as well as Presidential appointees, with varying procedural and remedial provisions, *id.* §§ 301-325, 105 Stat. at 1088-99; and previously-exempt employees were brought within the coverage of the laws, *id.* § 321, 105 Stat. at 1097-98.

The government's reliance on 42 U.S.C. § 1988(a) to bolster its argument for the application of § 1658 to the 1991 Act (Govt. Br. 24) is entirely inapt and simply begs the statutory interpretation question presented here. Section 1988 directs the courts to look to "the laws of the United States, *so far as such laws are suitable to carry [the Civil Rights Acts] into effect*." 42 U.S.C. § 1988(a) (emphasis supplied). If federal law does not govern, then courts look to state law. *Id.* But, plainly, the application of § 1658 would not be "suitable" if its very terms and purposes made § 1658 inapplicable here; § 1988(a) does not express a preference for the application of federal law that by its own terms is excluded. In part because this Court had already resolved the statute of limitations rule for § 1981 actions, see *Goodman*, 482 U.S. at 660-64, and for the other reasons explained in this brief, § 1658 cannot be "suitabl[y]"applied here.

If anything, § 1988(a), and its established interpretation of the limitations rule under § 1981, suggests that § 1658 does not apply here. Section 1988(a) has arguably been definitively interpreted by this Court to direct, as a matter of federal law, the use of state law to provide limitation periods under § 1981. See *Wilson*, 471 U.S. at 269-70 (the characterization of federal civil right claims for limitations purposes is a matter of federal law). Thus, § 1988(a), as interpreted by this Court, may "otherwise provide" a limitations period for § 1981 claims within the meaning of § 1658.

* * * *

All of the consequences of petitioners' and the government's interpretation of § 1658 contravene the purposes of § 1658. Instead of providing certainty and reducing litigation in connection with the collateral issue of

limitations, petitioners' and the government's interpretation of § 1658 creates hybrid limitations regimes that no rational Congress could have envisioned or intended and that no rational judiciary would willingly embrace, and breeds uncertainty and pointless, endless litigation.

It is, accordingly, ironic that petitioners and their *amici* urge the Court to adopt their interpretation in the interest of national uniformity. This Court has made clear that the need for national uniformity, though substantial, does not itself "'warrant the displacement of state statutes of limitations for civil rights actions.'" *Wilson*, 471 U.S. at 275 (quoting *Board of Regents* v. *Tomanio*, 446 U.S. 478, 489 (1980)). And, of course, the interpretation pressed by petitioners and their *amici* would not result in uniformity at all – there would be two limitations periods governing claims under a single statutory subsection, § 1981(a) (and any other federal statutory regimes amended post-December 1, 1990). In any event, Congress had the opportunity to impose uniformity at the expense of borrowed limitations periods when it enacted § 1658 and declined to do so.

C. Section 1658 Should Be Interpreted To Establish A Bright Line Rule And Preserve Existing Limitations Rules.

Once it is acknowledged – as it must be – that the phrase "arising under" is ambiguous and that neither the "federal ingredient" interpretation nor its "newness" gloss should be applied, the Court should interpret § 1658 to serve its statutory purposes and avoid the results described above. To do so, as demonstrated in this brief, this Court should interpret § 1658 to provide that petitioners' claims "aris[e] under" a statute enacted before December 1, 1990, to wit § 1981, because the operative language of that statute is the origin of the legal claims alleged, and because it has a settled limitations rule. Statutory amendments that expand or contract the scope of statutory terms employed in such codified claims, such as that found in § 1981(b), do not alter

this conclusion. This is because (a) civil actions that "aris[e] under" § 1981 and other statutory regimes that pre-date § 1658 have established limitations periods that Congress expressly sought to preserve, and (b) substantial uncertainty and endless litigation will result if any amendment creates a new claim. Thus, a claim "aris[es] under" a statute enacted *after* December 1, 1990, only if such a statute codifies a wholly new claim that does not have an existing limitations rule.

This interpretation of § 1658 best serves Congress's clear intent to preserve existing limitations rules, and to provide clear and definitive limitations rules for newly-created statutory regimes. As noted *supra* at 4-5, and as is set forth in the statutory language and in the relevant Committee Report, § 1658 bars any application of its limitations period to statutory regimes enacted prior to December 1, 1990, in order to preserve existing limitations rules and to provide clear and certain limitations rules for future statutory regimes. See also H.R. Rep. No. 101-734, at 24 ("[g]iven that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively").

Indeed, in interpreting statutory limitations rules, this Court has generally recognized that "[f]ew areas of law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Wilson*, 471 U.S. at 266 (internal quotations omitted); *id.* at 270 (recognizing the "federal interest" in "'firmly defined, easily applied rules'"). In applying statutory limitations provisions to civil rights laws, the Court has further held that "the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." *Id.* at 275.

Donnelley's interpretation of § 1658 is the most reasonable reading of the statute that comports with its purposes and the

purposes of federal limitations law generally and that entails none of the counter-productive and absurd results of the alternative interpretations proffered by petitioners and the government. Here, petitioners' claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts "aris[e] under" the original language of § 1981, effective since 1866, and subject to the settled limitations rule established by this Court in *Goodman*, 482 U.S. at 660. The alteration of the meaning of the "make and enforce" element of a § 1981 claim does not change the conclusion that the claim itself was codified in 1866 and 1870 and has an established limitations rule. Thus, petitioners' claims are not governed by § 1658's limitations period.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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